Supreme Court, U.S.
FILED
MAR 10 1995
OFFICE OF THE CLERK

No. 94-558 and 94-627

In the

Supreme Court of the United States

October Term, 1994

UNITED STATES,
Appellant,

v.

RAY HAYS, et al.,
Appellees,

STATE OF LOUISIANA, et al.,
Appellants,

v.

RAY HAYS, et al.,
Appellees.

On Appeal from a Three-Judge Panel of the United States District Court for the Western District of Louisiana

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES, RAY HAYS, et al.

ANTHONY T. CASO
*DEBORAH J. LA FETRA
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

IDENTITY AND INTERESTS OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. RACIAL CLASSIFICATIONS WHICH IMPACT SUFFRAGE MUST BE SUBJECT TO STRICT SCRUTINY 7

II. STATE-SPONSORED RACIAL SEPARATISM ENCOURAGES CONFLICT AMONG THE RACES AND MAKES FAULTY AND PROBLEMATIC ASSUMPTIONS ABOUT THE ROLES OF MINORITY REPRESENTATIVES AND CONSTITUENTS 12

A. Historical Basis for Moral Equality 13

B. Practical Consequences of Voting by Race 19

1. Who Do Gerrymandered Candidates Represent? 20

2. The Costs of Stigmatic Harm 22

3. Erroneous Assumptions Attributing Certain Individual Characteristics to a Group 24

CONCLUSION 27

TABLE OF AUTHORITIES CITED

Page

CASES

Adarand v. Pena, Sup. Ct. Docket No. 93-1841 2

Allen v. State Board of Elections, 393 U.S. 544 (1969) 18

Anderson v. Martin, 206 F. Supp. 700 (D. La. 1962) (Wisdom, J., dissenting) rev'd, 375 U.S. 399 (1964) 16

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 9

Buchanon v. Warley, 245 U.S. 60 (1917) 17

Chisom v. Roemer, 501 U.S. 380 (1991) 2

District of Columbia v. Thompson, 346 U.S. 100 (1953) 17

Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 25

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 7,10

Hirabayashi v. United States, 320 U.S. 81 (1943) 7-8

Holder v. Hall, 512 U.S. ___ 129 L. Ed. 2d 687 (1994) 20,23,25-26

Holland v. Illinois, 493 U.S. 474 (1990) 25

Korematsu v. United States, 323 U.S. 214 (1944) 7

Page

Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) 8

League of United Latin American Citizens v. Attorney General of Texas, 501 U.S. 419 (1991) 2

Loving v. Virginia, 388 U.S. 1 (1967) 26

Palmore v. Sidoti, 466 U.S. 429 (1984) 26

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 9

Plessy v. Ferguson, 163 U.S. 537 (1896) 16-17,27-28

Shaw v. Reno, 509 U.S. ___, 125 L. Ed. 2d 511 (1993) 8-11,24-25

Shelley v. Kraemer, 334 U.S. 1 (1948) 24

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 22

Reynolds v. Sims, 377 U.S. 533 (1964) 8

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) . . . 2,8-9,11

Thornburg v. Gingles, 478 U.S. 30 (1986) 5

United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) 9

United States v. Dallas County Commission, 850 F.2d 1433 (11th Cir. 1988) 20

Washington v. Davis, 426 U.S. 229 (1976) 8

Watson v. Memphis, 373 U.S. 526 (1963) 17

Page

Whitcomb v. Chavis, 403 U.S. 124 (1971) 23-24

Wright v. Rockefeller, 376 U.S. 52 (1964) 17-18,21

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 9

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 7

RULES

Supreme Court Rule 37 1

REGULATIONS

42 U.S.C. § 1971 (1988) 4

§ 1973 4

§ 1973a(c) 4

§ 1973bb-1 4

MISCELLANEOUS

J. Barlow, Advice to the Privileged Orders in the Several States of Europe Resulting From the Necessity and Propriety of a General Revolution in the Principles of Government (Ithaca, N.Y., 1956, first published London, 1792) 14-15

D. Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (Basic Books, Inc, N.Y., 1987) 22

Page

H. Belz, Equal Protection and Affirmative Action, The Bill of Rights in Modern America (Bodenhamer & Ely, eds., Indiana University Press, 1993) 26

H. Commager, Documents of American History Vol. 1 (9th ed. 1973) 15,18

T. Eastland and W. Bennett, Counting by Race: Equality from the Founding Fathers to Bakke and Weber (Basic Books, Inc. N.Y., 1979) 12,15-26,22-23

The Federalist No. 51 (Rossiter ed. 1961) 13-14

H. Jaffa, How to Think About the American Revolution: A Bicentennial Celebration (Carolina Academic Press, Durham, N.C., 1978) 13-15

A. Kull, A Color Blind Constitution (Harvard University Press Cambridge, 1992) 19

J. Locke, Two Treatises of Government 121 (T. Cook ed. 1947) 13

Martin, The Parable of the Talents, 256 Harper's 18 (January, 1978) 22

J. R. Pole, The Pursuit of Equality in American History, 2d ed. revised (University of California Press Berkeley, 1993) 21-22,24,27

T. Sowell, A Conflict of Visions: Ideological Origins of Political Struggles (William Marrow & Co., N.Y., 1987) 12

T. Sowell, Civil Rights: Rhetoric or Reality? (William Morrow & Co., N.Y., 1984) 19,23

Page

Sperling, Note, Equal Protection and Race-Conscious Reapportionment: Shaw v. Reno, 113 S. Ct. 2816 (1993), 17 Harv. J. of L. and Pub. Pol'y 283 (1994) 9

4 The Collected Works of Abraham Lincoln (R. Basler ed. 1953) 15

G. Wood, Creation of the American Republic, 1776-1789, (University of North Carolina Press 1969) 15

No. 94-558 and 94-627

In the

Supreme Court of the United States

October Term, 1994

UNITED STATES,
Appellant,

v.

RAY HAYS, et al.,
Appellees,

STATE OF LOUISIANA, et al.,
Appellants,

v.

RAY HAYS, et al.,
Appellees.

On Appeal from a Three-Judge Panel of the United States District Court for the Western District of Louisiana

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES, RAY HAYS, et al.

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus

curiae in support of appellees, Ray Hays, *et al.* All parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the voting rights arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Adarand v. Pena*, Sup. Ct. Docket No. 93-1841, *Chisom v. Roemer*, 501 U.S. 380 (1991), *League of United Latin American Citizens v. Attorney General of Texas*, 501 U.S. 419 (1991), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

PLF believes that this Court's opinions regarding racial classifications, both in the voting rights context and otherwise, require strict scrutiny. This includes congressional districts gerrymandered on the basis of race. The historical vision of equal rights--focusing on the rights of individuals rather than groups--must be placed at the forefront of analysis. The more recent permutation of "equality" based on numbers illegitimately subverts the moral equality on which our republic is based and imposes a crude form of proportional representation. American's melting pot

cannot easily withstand the onslaught of hyphenated Americans claiming rights based solely on racial characteristics.

For the reasons stated herein, the decision of the Western District of Louisiana should be affirmed.

STATEMENT OF THE CASE

Louisiana's Fourth Congressional District is bizarre. The district cuts across historical and cultural divides, splits 12 of its 15 parishes, and divides 4 of the 7 major cities of the state. It is 250 miles long. It ignores all traditional North-South, ethno-religious, economic, and historical distinctions in the state. *Hays v. Louisiana*, 862 F. Supp. 119, 126 (W.D. La. 1994) (Shaw, J., concurring).

What is the cause of this strange district, which lacks both compactness and commonality of interests? Racial gerrymandering. About 55% of the district's voting age population is black. *Id.* at 122. Louisiana currently has seven seats in the United States House of Representatives, down one from the eight seats it had until the 1990 census. Of those seven seats, one has long been designated a "majority-minority" seat--that is, the black minority constitutes a majority of the voting-age population. *Hays v. Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993).[1] This district (District 2), covering the New Orleans area, is unchallenged. *Id.* Louisiana created District 4, however, in response to pressure from the United States Department of

---

[1] The more recent *Hays* case adopted by reference the earlier decision striking down the first incarnation of Louisiana Congressional District 4. *Hays*, 862 F. Supp. at 121.

Justice. *Hays*, 862 F. Supp. at 122. Actually, District 4 has been twice drawn and twice challenged.

The first legislative rendering created a Z-shaped district that ran from the northwest part of the state near Shreveport diagonally along the Red River to Alexandria and then farther southeast along the Mississippi River past Baton Rouge. *Hays*, 839 F. Supp. at 1199. About 63% of the district's voting age residents were black. *Id.* at 1191. When a three-judge District Court struck down this racial gerrymander after applying strict scrutiny, *id.* at 1218, the state legislature tried again. They came up with the district described above.

Again the three-judge District Court below struck down the gerrymander. *Hays v. Louisiana*, 862 F. Supp. at 119. The court found the second attempt to be merely a "cosmetic makeover" of the initial gerrymander. *Id.* at 122 n.1. All persons involved directly with the formation of the district acknowledged that the creation of a second majority-minority district was the specific intent of the Legislature. *Id.* at 122. Such creation was wholly unnecessary under the Voting Rights Act.[2] Section 5 of the Voting Rights Act creates an affirmative duty to avoid retrogression or enactment of a plan that has the purpose or effect of denying or abridging the right to vote because of race or color. 42 U.S.C. § 1973a(c) (1988). Because one out of seven seats is an automatic *progression* from one out of eight seats, the court below found Section 5 inapplicable. *Hays*, 862 F. Supp. at 123. The fact that the Department of Justice threatened to withhold preclearance if a second district was not created, while a real concern, was not a compelling one.

---

[2] Pub. L. No. 89-110, 79 Stat. 445, codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988).

Id. at 123 n.3. Section 2 of the Voting Rights Act is violated if a state's apportionment scheme effectively diminishes or abridges the voting strength of a protected class. *Id.* at 123. However, the court below relied on this Court's decision which held that "dilution" claims must be conditioned on the existence of a numerous and compact minority that is politically cohesive and subject to majority bloc voting usually defeating the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Hays*, 862 F. Supp. at 123-24. The court below, simply by looking at the composition of District 4, found that the state could not even find a "compact minority" and, thus, Section 2 did not apply. *Hays*, 862 F. Supp. at 124. The court further found that, even if a compelling interest on the part of the state existed (which it did not), the district was not narrowly tailored in any respect. Thus, the racial gerrymander violated the Equal Protection Clause. *Id.* at 124-25.

Finally, the court found that individual voting rights suffer constitutional injuries when subjected to racially motivated gerrymanders. *Id.* at 125. The court concluded:

> The validity of equal protection and the systemic legitimacy of our electoral process are threatened when a State sculpts voting districts along race lines. As here, when the State cannot, or has not, offered and supported an extraordinary justification for these questionable measures, the race-conscious enactments must fall.

Id. at 125.

The Justice Department and the State of Louisiana both appealed the District Court's decision, while Ray Hays, *et al.*, moved to affirm the judgment. This Court

consolidated the appeals and noted probable jurisdiction on December 12, 1994.

SUMMARY OF ARGUMENT

Racial classifications, inherently problematic, also violate the Fourteenth Amendment of the United States Constitution unless they are narrowly tailored to further a compelling governmental interest. Racial classifications tied to suffrage are not excepted from this standard. The combination of a classification affecting a suspect class as well as a fundamental right leaves no alternative. The court below correctly subjected the statutory creation of Louisiana Congressional District 4 boundary lines to strict scrutiny.

Historically, American political thought emphasized equality of opportunity, "moral equality," over equality of results, "numerical equality." From the Founding and the Civil War through the enactment of the landmark civil rights legislation in the 1960s, both government and citizen activists agreed that moral equality was the basis for a strong, nondiscriminatory republic. For the past 25 years, however, numerical equality superseded moral equality as the foundation for governmental decision making. This ascendance of numerical equality is contrary to the premises on which America achieved its distinctive greatness.

Moreover, as a matter of policy, both the state and federal governments should attend to voting rights with an eye toward encouraging the greatest possible exercise of the franchise while minimizing the deeply divisive racial classifications which inhere in majority-minority districts. Racial gerrymandering creates numerous injuries, both to those within and without the district lines, both representatives and constituents. It creates a rift between representatives and those constituents who do not share either

the physical or ethnic characteristic which assured the representatives' election or the political views of the representative assured election. It stigmatizes those who are elected with the government's rigged rules, as though such election could never otherwise be achieved. And perhaps most importantly, it repudiates the individuality of all people within the district, viewing them primarily, if not entirely, as mere members of a presumably homogenous group.

For the reasons stated below, the Western District of Louisiana's decision invalidating the racially gerrymandered Congressional District 4 should be affirmed.

ARGUMENT

I

RACIAL CLASSIFICATIONS WHICH IMPACT SUFFRAGE MUST BE SUBJECT TO STRICT SCRUTINY

The State of Louisiana and the United States Department of Justice inexplicably insist there is a real issue as to whether the court below correctly analyzed this case by using strict scrutiny. United States Department of Justice, Jurisdictional Statement at 10-12; Louisiana Department of Justice, Jurisdictional Statement at 10-15. This Court has long held that racial classifications must be analyzed under strict scrutiny. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). This is so not only for classifications appearing on the face of legislation but also for those classifications which have a discriminatory effect. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886). This highest level of scrutiny is justified because racial classifications "are by their very nature odious to a free people whose institutions are founded upon the

doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

Moreover, this Court held in *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), that the right to vote is a fundamental right which must also withstand strict scrutiny. *See also Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969). *Shaw v. Reno*, 509 U.S. ___, 125 L. Ed. 2d 511 (1993), addressed a North Carolina gerrymander which, like this case, also contained issues relating to both racial classifications and suffrage. In *Shaw*, this Court analyzed the racial gerrymander under strict scrutiny. *Id.* at 526. The combined effect of a racial classification impacting the fundamental right to vote cannot logically be reduced to analysis less than its component parts. *Shaw* viewed its application of strict scrutiny as an unremarkable consequence of many other cases which did precisely the same thing. After all, in the voting context or otherwise, the central purpose of the Fourteenth Amendment is to prevent the state from purposefully discriminating on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Shaw*, 125 L. Ed. 2d at 525.

The *Shaw* Court explained that reapportionment legislation which cannot be understood as anything other than an effort to classify and separate voters by race injures voters in two distinct ways: (1) it reinforces racial stereotyping, and (2) it undermines our country's system of representative democracy. *Shaw*, 125 L. Ed. 2d at 526. The majority ruled that state legislation which expressly distinguishes among citizens on account of race--whether it contains an explicit distinction or is unexplainable on grounds other than race--must be narrowly tailored to further a compelling state interest. *Id.* The Court compared its decision to several earlier cases, including *Richmond v. J.A. Croson Co.*, 488 U.S. at 493 (stating that express racial classifications are

immediately suspect because "[a]bsent searching judicial inquiry ... there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics"); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277-78 (1986) (plurality opinion) (stating that the Fourteenth Amendment requires that "state legislation which expressly distinguishes among citizens based on their race be narrowly tailored to further a compelling governmental interest"); and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) ("[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification"). Moreover, "[t]hese principles apply not only to legislation that contains explicit racial distinctions, but also to those 'rare' statutes that, although race-neutral, are, on their face, 'unexplainable on grounds other than race.'" *Shaw*, 125 L. Ed. 2d at 526, (citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). These statutes "demand[] the same close scrutiny that we give other state laws that classify citizens by race." *Shaw*, 125 L. Ed. 2d at 527 (citation omitted).

Although the *Shaw* Court attempted to reconcile its decision with *United Jewish Organizations of Williamsburgh, Inc. v. Carey (UJO)*, 430 U.S. 144, 161 (1977), which held that "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment," such reconciliation was misleading and unnecessary because *UJO* predates the *Croson* and *Wygant* decisions subjecting remedial race-conscious legislation to strict scrutiny. *See* Sperling, *Note, Equal Protection and Race-Conscious Reapportionment: Shaw v. Reno, 113 S.Ct. 2816 (1993)*, 17 HAR. J. OF L. AND PUB. POL'Y 283, 288-89 (1994). The court below thus noted the *Shaw* court's

reliance on "more recent equal protection precedents, focusing on individual rights as opposed to *UJO's* group-based approach." *Hays*, 862 F. Supp. at 123.

Shaw specifically refutes the argument of appellants in this case, that strict scrutiny is "unworkable" because of the variety of factors considered when drawing all districts. *See* Louisiana Department of Justice, Jurisdictional Statement at 13-14. "The difficulty of proof ... does not mean that a racial gerrymander, once established, should receive less scrutiny under the Equal Protection Clause than other state legislation classifying citizens by race." *Shaw*, 125 L. Ed. 2d at 528. *Shaw* noted that some cases would not be difficult, such as the "uncouth" district in *Gomillion* (364 U.S. at 341) or a case in which a state "concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Id.* at 528. This is precisely the case currently before the Court. The court below found District 4 to be a classic racial gerrymander and dismissed the state's proffered explanations as post hoc rationalizations. *Hays*, 862 F. Supp. at 122.

Louisiana argues that its racial gerrymander should be valid because it was based on a former political gerrymander (Louisiana Jurisdictional Statement at 16-18). The court below, however, found that the new district was undeniably drawn to assure a certain percentage of black voters within the district. *Hays*, 862 F. Supp. at 122. The former District 8, drawn to ensure the reelection of Gillis Long, was also bizarrely shaped but never challenged because it was a political, rather than racial, gerrymander. *Id. Shaw* found a significant distinction between the two types of redistricting.

Strict scrutiny is appropriate for racial gerrymanders even when not necessarily so for political gerrymandering because of

> our country's long and persistent history of racial discrimination in voting--as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race.

Shaw, 125 L. Ed. 2d at 531. The lines of the "Old Eighth" are only roughly approximate to the new District 4. *Hays*, 862 F. Supp. at 122 n.2; United States Jurisdictional Statement at 111a-114a (maps of District 8 from 1967-1992). The peculiar extensions from the general area of the "Old Eighth" both to the North and South while excluding territory in the East, can be explained only by the state's determination to pack a certain percentage of citizens into a single district. *Hays*, 862 F. Supp. at 122-23. Even on its merits, Louisiana's post hoc rationalization for the gerrymander must fail.

The need for strict scrutiny is evident. Courts must inquire into the justification for race-based measures so as to determine which "classifications are in fact motivated by illegitimate notions of racial inferiority or ... *racial politics*." *Croson*, 488 U.S. at 493 (emphasis added). Of course, gerrymanders are inherently political and the racial aspect of the particular gerrymander under review cannot be denied. Strict scrutiny by the court below brought forth the fact that Louisiana fully complied with the Voting Rights Act with a single minority-majority district encompassing New Orleans. *Hays*, 862 F. Supp. at 123-24. "Without concrete evidence of the lingering effects of past discrimination or continuing legal prejudice in voting laws and procedures, coupled with specific remedies, we cannot agree that the re-segregation of

Louisiana by racially configured voting districts is warranted." *Id.* at 124. The court below correctly held that any further attempts to "tinker with district lines in order to ensure minority control at the polls" violates the Fourteenth Amendment. *Id.*

II

STATE-SPONSORED RACIAL SEPARATISM ENCOURAGES CONFLICT AMONG THE RACES AND MAKES FAULTY AND PROBLEMATIC ASSUMPTIONS ABOUT THE ROLES OF MINORITY REPRESENTATIVES AND CONSTITUENTS

Moral equality requires that government and society consider every person as an individual, not as a fungible member of some racial or ethnic group. Moral equality forbids government from handicapping individuals for arbitrary or discriminatory reasons. It has been alternatively described as "equality of opportunity," especially when contrasted with numerical equality, or "equality of results." T. Eastland and W. Bennett, *Counting By Race: Equality from the Founding Fathers to Bakke and Weber*, 9-10 (Basic Books, Inc., N.Y., 1979) (Counting by Race); *see also* T. Sowell, *A Conflict of Visions: Ideological Origins of Political Struggles*, 121-40 (William Morrow & Co., N.Y., 1987). America was founded on the basis of moral equality as it is so eloquently phrased in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." The institution of slavery existed at the time of the Declaration and was hopelessly inconsistent with it. For nearly a century, the incompatibility provoked tremendous political debate which

was finally resolved when Abraham Lincoln declared an end to slavery in 1863 and subsequently won the Civil War. The Fourteenth Amendment enshrined the victorious concept of moral equality after the Civil War and this concept was still the norm through the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Only within the last 25 years has devotion to numerical equality threatened to subsume moral equality as the basis for the American republic.

A. Historical Basis for Moral Equality

The notion of moral equality is the thread winding through the tapestry of philosophical thought which most influenced the Founding of the American republic. In John Locke's Second Treatise, the philosopher considered "what state all men are naturally in." J. Locke, *Two Treatises of Government* 121 (T. Cook ed. 1947), *cited in* H. Jaffa, *How to Think About the American Revolution: A Bicentennial Celebration* (Carolina Academic Press Durham, N.C., 1978) (How to Think) at 40. It is, he said, "a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man." *Id.* It was this concept of natural freedom and equality that provided the principle that the just powers of government in the American political tradition are derived from the consent of the governed. Because the right of consent is itself derived from the equality of all humans, consent is limited--one may not consent to that which denies the premise of equality. How to Think at 40-42. The concept of equality is reiterated in James Madison's *Federalist No. 51*. There, Madison wrote, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the

next place oblige it to control itself." *Federalist No. 51*, (Rossiter ed. 1961) at 322. A government of men over men, rather than of angels over men, or of men over beasts, presumes the moral equality of the men who govern, not only among themselves but also with the governed. Thus, the very nature of the problem that the Constitution was written to resolve is determined by the meaning of equality. How to Think at 42.

British political scientist Joel Barlow wrote in 1792 that the American notion of moral equality created the Revolution and sustained American freedom. He noted that, in America, the word "people" meant the whole community and comprehended every human being in the society. There were only "individuals" in America; there could be nothing else--no orders, no lords, no monarchs. Rather, Americans revered only those distinctions which nature created--a diversity of talents, abilities, and virtues:

> They all feel that nature has made them equal in respect to their rights; or rather that nature has given to them a common and an equal right to liberty, to property, and to safety; to justice, government, laws, religion, and freedom. They all see that nature has made them very unequal in respect to their original powers, capacities, and talents. They become united in claiming and in preserving the equality, which nature has assigned to them; and in availing themselves of the benefits, which are designed, and may be derived from the inequality, which nature has also established.

J. Barlow, *Advice to the Privileged Orders in the Several States of Europe Resulting from the Necessity and Propriety*

of a General Revolution in the Principles of Government 17 (Ithaca, N.Y., 1956, first published London, 1792), *cited in* G. Wood, *Creation of the American Republic, 1776-1789* 607 (University of North Carolina Press 1969). The obvious conflict between the earlier notions of moral equality and the institution of slavery was not fully resolved in American political and legal thought until Abraham Lincoln freed all the slaves with the Emancipation Proclamation on January 1, 1863, *reprinted in* H. Commager, *Documents of American History* Vol. 1 420-21 (9th ed. 1973) (Documents), and the states ratified the Thirteenth Amendment to the United States Constitution on December 6, 1865.

Lincoln's importance to the development of the concept of moral equality cannot be underestimated. His main insight was that the principle of equality was logically necessary to the idea of self-government. *Lincoln's First Inaugural Address* (March 4, 1861), *reprinted in* Documents at 386-88. Self-government, by definition, requires the assumption that all humans possess free will and that all are morally autonomous, capable of choosing right and wrong. In this sense, all individuals are created equal and, thus, for one person to deal with another, because of race, in ways that deny or diminish the other's intrinsic worth as a moral agent is to deny the very basis upon which self-government is possible. Counting By Race at 55-56.

In his message to Congress of July 4, 1861, Lincoln defined the cause of the Union. It was, he said, to maintain in the world "that form, and substance of government, whose leading object is, to elevate men--to lift artificial weights from all shoulders--to clear the paths of laudable pursuit for all--to afford all, an unfettered start, and a fair chance, in the race of life." 4 *The Collected Works of Abraham Lincoln* 438 (R. Basler ed. 1953), *cited in* How to Think at 34. Thus, republican government, in Lincoln's view, necessitated the

elimination of slavery because it required recognition of the principle of moral equality. Lincoln believed this principle was higher than that of popular sovereignty; indeed, he believed that the principle of equality was higher than any other: It defined republican government. Counting By Race at 47.

The passage of the Civil War Amendments in 1865-1870 highlighted the primacy of moral equality. The moral equality espoused by President Lincoln led to the judicial concept of a color-blind Constitution:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In 1962, Judge John Minor Wisdom argued that a Louisiana law requiring racial identification on ballot applications should be overturned: "The vice in the law is the State's placing its power and prestige behind a policy of racial classification inconsistent with the elective processes. ... If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." *Anderson v. Martin*, 206 F. Supp. 700, 705 (D. La. 1962) (Wisdom, J., dissenting) *rev'd*, 375 U.S. 399 (1964).

The following year, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), this Court confronted the black establishment, represented by Adam Clayton Powell, who intervened in the case to argue in favor of a racial gerrymander.[3] Justice Douglas, in dissent, exposed the self-interested reasons and self-destructive effects of such an argument. Justice Douglas noted that the intervenors and the state did not appear to support segregation under *Plessy v. Ferguson*'s "'separate but equal'" theory, but rather under a theory which might be called "'separate but better off.'" *Wright*, 376 U.S. at 62 (Douglas, J., dissenting). This theory had surfaced before in *Buchanon v. Warley*, 245 U.S. 60, 81 (1917), to support municipal segregation of residential areas; in *District of Columbia v. Thompson*, 346 U.S. 100, 115-16 (1953), to support segregation in restaurants; and in *Watson v. Memphis*, 373 U.S. 526, 535-36 (1963), to support delayed integration of municipal parks. Justice Douglas found the fact that political leaders discovered an advantage in a racial gerrymander to be irrelevant to the constitutional issues. "Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards." *Wright*, 376 U.S. at 62 (Douglas, J., dissenting). The court below similarly derided "incumbency politics" as a purported justification for a racial gerrymander. *Hays*, 862 F. Supp. at 123.

Harkening back to the evolution of moral equality under Lincoln, Justice Douglas found racial voting practices abhorrent. Douglas correctly emphasized that our country is

---

[3] Current incumbent Congressman from Louisiana District 4, Cleo Fields, testified at the trial. *See, e.g., Hays*, 839 F. Supp. at 1208.

created of the people, by the people, for the people.[4] "[T]he individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. *Cf. Gray v. Sanders*, 372 U.S. 268, 379 [(1963)]." *Wright*, 376 U.S. at 66. (Douglas, J., dissenting). History has surely demonstrated the truth in Justice Douglas' position when he forecast that racial gerrymandering and proportional representation divides communities by emphasizing differences between candidates that are irrelevant in the constitutional sense. While individual voters may take into account any factors they choose when it comes time to vote, government has no business designing electoral districts along racial lines. *Id.*

Only two years after *Wright*, Congress enacted the Voting Rights Act. Section 5 of the Act was intended to safeguard Section 4's prohibition of literacy tests and other prerequisites for *voting*. The whole concern of the act was to ensure nondiscriminatory access to the ballot. *See Allen v. State Board of Elections*, 393 U.S. 544, 582-94 (1969) (Harlan J., dissenting). Whether or not the casting of the ballot would prove "effective"--in the sense of the political consequences--appeared nowhere in the statute or its

---

[4] This is a reference to the Gettysburg Address, in which Lincoln said, "[i]t is rather for us to be here dedicated to the great task remaining before us ... that this nation, under God, shall have a new birth of freedom--and that government of the people, by the people, for the people, shall not perish from the earth." A. Lincoln, *The Gettysburg Address* (Nov. 19, 1863), *reprinted in* Commager, Documents, at 428-29.

legislative history. On the contrary, the Act's assurance of access to the ballot was intended to enable minorities to assert political power on the same terms as everyone else. The act nowhere suggests that the full and "undiluted" exercise of the franchise required a district in which blacks formed a majority. A. Kull, *A Color Blind Constitution*, 213 (Harvard University Press Cambridge, 1992). The decision of the court below is fully consistent with the American tradition of moral equality and should be affirmed.

B. Practical Consequences of Voting by Race

The battle for true civil rights based on moral equality was fought and won many years ago. Like any fundamental human achievement, these rights cannot be taken for granted and must be safeguarded. However, some permutations of civil rights have become divorced from the moorings of moral equality:

> [C]ivil rights are not protected or enhanced by the growing practice of calling every issue raised by "spokesmen" for minority, female, elderly, or other groups, "civil rights" issues. The right to vote is a civil right. The right to win is not. Equal treatment does not mean equal results. Everything desirable is not a civil right.

T. Sowell, *Civil Rights: Rhetoric or Reality?*, 109 (William Morrow & Co., N.Y., 1984) (Rhetoric or Reality).

The harms from pursuing the course advocated by the United States and Louisiana Departments of Justice fall into three categories: (1) the rift between representatives and some constituents; (2) stigmatizing representatives who are

elected with government assistance; and (3) immoral assumptions that deny a person's individuality in favor of mere group membership.

1. Who Do Gerrymandered Candidates Represent?

As a practical political matter, segregating political districts by race only deepens racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions. Black candidates are easily elected in safe black districts while white candidates are elected in safe white districts. Neither whites nor blacks have any incentive to seek support from the other's constituency. *Holder v. Hall*, 512 U.S. ___, 129 L. Ed. 2d 687, 711-12 (1994) (Thomas, J., concurring).

> We are bent upon polarizing political subdivisions by race. The arrangement we construct makes it unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens.

United States v. Dallas County Commission, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring specially).

As this Court recognized in *Shaw*, 125 L. Ed. 2d at 529, "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that

group, rather than their constituency as a whole." Thirty years ago, Justice Douglas also bluntly made this point:

> When racial ... lines are drawn by the State, the multiracial ... communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race ... rather than to political issues are generated; communities seek not the best representative but the best racial ... partisan. Since that system is at war with the democratic ideal, it should find no footing here.
>
> "Separate but equal" and "separate but better off" have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public.

Wright, 376 U.S. at 67 (Douglas, J., dissenting).

A state-imposed racial gerrymander also assumes that, given a choice, black voters would not exercise broader influence over a number of competitive districts. One of the obvious (if indirect and unintended) effects of creating and maintaining safe black seats is to isolate the black community, as well as to diminish electoral competition. Where black voters are confined to a single constituency, they might well be certain of electing *one* black candidate, but the elected representative might also be the only one--or a member of a small, heavily outnumbered and consequently ineffective band. Meanwhile, the black electorate suffers a diminished capacity to influence white representatives who might have taken their concerns into account if they themselves had needed to rely on black votes. J. R. Pole,

The Pursuit of Equality in American History, 449-50 (2d ed. revised, University of California Press, Berkeley, 1993) (Pursuit of Equality); D. Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice*, 96 (Basic Books, Inc. N.Y., 1987) (proportional representation would "worsen racial tensions because it distorts the political process in order to create targeted entities less likely to engage in the coalition building that is the hallmark of American politics").

Given the polarizing nature of a racial gerrymander, one might inquire just what is the minority representative supposed to contribute? It is inappropriate to treat people simply as bearers of some imagined racial or ethnic perspective--to treat them, in other words, as categories. True diversity is not achieved by looking to "personal qualities crude enough to be obvious to sense perception." Counting By Race at 152, (citing Martin, "*The Parable of the Talents*," 256 *Harper's* 18, 21 (January, 1978)).

2. The Costs of Stigmatic Harm

The nature of stigmatic harm from preferential policies is well-documented in contexts ranging from contracting preferences, to school admissions, to voting rights. This Court has often acknowledged this danger of stigmatic harm. In *Croson*, 488 U.S. at 493, this Court held that contracting preferences must be strictly reserved for remedial settings or they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. In *Regents of the University of California v. Bakke*, 438 U.S. 265, 298 (1978), the Court noted that preferential student admissions programs reinforce common stereotypes that certain groups cannot achieve success without special protection based on a factor having no relation to individual worth. Finally, as Justice Thomas recently stated in the context of voting rights, "few devices could be better

designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act." *Holder*, 129 L. Ed. 2d at 711 (Thomas, J., concurring).

Racial gerrymanders prescribe disharmony among the races. It draws attention to racial differences and, though not intending to do so, exacerbates them in some minds. The failures of the Great Society amply demonstrate that drawing attention to race cannot draw us closer to the realization of a colorblind society. Racial gerrymandering simply is not necessary for achieving moral equality in the voting rights context. The Voting Rights Act provides individual minorities, who may choose to form coalitions on any basis they choose, a real chance and a real opportunity to participate in the electoral process. Racial gerrymandering distorts the abilities of minority candidates and political organizations and also denigrates the real and substantial achievements they have recorded during the past decade, as well as their expected real and substantial achievements in the future. *See* Counting by Race at 157. *Cf.* Rhetoric or Reality at 49-50 (demonstrating historical trend of increasing black representation in professional, technical, and other high-level occupations both prior and subsequent to the Civil Rights Act of 1964).

Lastly, in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), a case involving the reapportionment of the Indiana legislature using multimember districts, this Court noted the limitations of using race as the primary factor in deciding electoral questions. In that case, it was not the blacks in their capacity as blacks but the Democrats as a political party who had lost the election under scrutiny; there were ways of losing elections other than being black. *Id.* at 153. Repudiating the claim that minorities should be entitled to proportional representation as a matter of fairness, the Court

insisted that the plaintiffs must show that their lack of legislative representation was attributable to a built-in bias rather than to voting for the wrong party and losing at the polls. *Id.* at 154. The Court thus implied that candidates are entitled to win or lose an election on their merits and defects, or those of their party. *Id.* at 154-55. One may not assume that when white candidates lose elections it is on account of the political issues, but when minority candidates lose elections it is always on account of race. *See* Pursuit of Equality at 448-49.

3. Erroneous Assumptions Attributing Certain Individual Characteristics to a Group

The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). The court below specifically recognized that an individual injury occurs "[w]hen voting districts are carefully planned like racial wards." *Hays*, 862 F. Supp. at 125.

Shaw explicitly denounced the assumptions which underlie racial gerrymandering:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group--regardless of their age, education, economic status, or the community in which they live--think alike,

> share the same political interests, and will prefer the same candidates at the polls. ... By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

Shaw, 125 L. Ed. 2d at 529. *Shaw* noted that it was certainly not the first Supreme Court opinion to reject such perceptions as impermissible racial stereotypes. *Id.* at 529, (citing *Holland v. Illinois*, 493 U.S. 474, 484 n.2 (1990)) (prosecutor's assumption that a black juror may be presumed to be partial simply because he is black violates the Equal Protection Clause) and *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) (automatic invocation of race stereotypes retards progress as a multiracial democracy and causes continued hurt and injury). So, too, the court below held that "[a]ll citizens are stigmatized by the notion that their 'interests' can be defined by race or will be represented adequately only if a member of their racial 'group' holds a particular office." *Hays*, 862 F. Supp. at 125.

In *Holder v. Hall*, Justice Thomas further surveyed the damage done. He found the most pernicious aspect of the Court's foray into political theory to be the willingness to accept the one underlying premise that must inform every minority vote dilution claim: the assumption that the group asserting dilution shares not only racial or ethnic characteristics, but also distinct political interests. By forcing minorities who do not share geographic or local interests in a single congressional district for the sole purpose of assuring minority representation, the Court must assume that members of racial and ethnic groups all think alike on important matters of public policy and must have correspondingly racial or ethnic representatives in elected bodies if they are to be considered represented at all. *Holder*,

129 L. Ed. 2d at 711 (Thomas, J., concurring). The court below also recognized the dangerous stereotypes inherent in the appellants' arguments. The court refused "to accept the explanation that citizen response to issues such as education, crime and health care is driven by skin pigmentation. Legitimation of that notion would herald the demise of equal protection." *Hays*, 862 F. Supp. at 124.

The pursuit of numerical, rather than moral, equality unfortunately has been embraced by virtually all institutions of government and some public opinion. The most disturbing aspect of this shift in political thought is the disavowal of individual rights in favor of a collective group rights concept of equality. All blacks are held to be victims of discrimination and hence entitled to compensation. All whites are held to have benefited unjustly from the system of racial discrimination and are guilty. These assumptions stand in fundamental opposition to the universal principle of individual rights that has been the moral and intellectual foundation of the American republic. *See* H. Belz, *Equal Protection and Affirmative Action, The Bill of Rights in Modern America* 173 (Bodenhamer & Ely, eds., Indiana University Press, 1993).

These assumptions are faulty, not only because they refuse to treat individuals as valid outside the context of their group membership, but also because ethnic identity is inherently unstable. It tends to change shape and character over time. Many individual members of racial or ethnic communities, in the course of their daily lives, mix freely with others in the workplace, in schools and colleges, in recreation and entertainment facilities, neighborhoods, and (sometimes consequently) weddings. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429 (1984) (parent may not lose custody due to remarriage to person of another race); *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation statute held

unconstitutional). These instabilities follow inevitably from a volatile human nature in a relatively free society. But the United States and Louisiana Departments of Justice are not daunted by these tendencies. The United States is not a republic of nations; but appellants appear willing to contemplate with equanimity the prospect of a republic of political ethnicities. *See* Pursuit of Equality at 451-52. One need only pick up the international page of a newspaper to be reminded of the atrocities that can occur in such a polarized climate. The United States is a republic of equal citizens, not a republic of ethnic or religious groups. The Constitution speaks only of individuals; therefore, our elected officials must represent individuals. A racial gerrymander which elevates racial characteristics above any of the individuals in the district must be struck down.

CONCLUSION

Repeated so often, the words of Justice Harlan in dissent from *Plessy v. Ferguson* have taken on the tone of a mantra. And yet, the meaning and import of those words has increased as the American struggle with race relations has continued in the century since that case was decided.

> The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. ...
>
> The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civil freedom, and of the equality before

> the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race ... under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races, the continuance of which must do harm to all concerned.

Plessy v. Ferguson, 163 U.S. at 560-61 (Harlan, J., dissenting). Once more, we note the truth of Justice Harlan's dissent and urge this Court to uphold the legacy of truth by affirming the decision of the court below.

DATED: February, 1995.

Respectfully submitted,

ANTHONY T. CASO
*DEBORAH J. LA FETRA
**Counsel of Record*
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, CA 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae